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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

INFINITY HEADWEAR & APPAREL, LLC, an Arkansas limited liability company, Plaintiff, vs. JAY FRANCO & SONS, INC., a New York corporation; and JAY AT PLAY INT'L HK LTD., a Hong Kong limited company, Defendants.	Case No.: 1:15-cv-01259 (JPO) (RLE) **PLAINTIFF INFINITY HEADWEAR & APPAREL, LLC'S REPLY IN FURTHER SUPPORT OF ITS OPENING CLAIM CONSTRUCTION BRIEF** Hon. Judge J. Paul Oetken Hon. Magistrate Judge Ronald L. Ellis

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Pursuant to Federal Rule of Civil Procedure 7, Local Civil Rules 7.1 and 11.1, Local Patent Rule 12(c), and Paragraph 8(f) of the Court's Patent Case Scheduling Order,[1] Plaintiff Infinity Headwear & Apparel, LLC ("Infinity" or "Plaintiff"), by and through undersigned counsel, hereby respectfully submits this Reply (the "Reply") in Further Support of Infinity's Opening Claim Construction Brief (hereinafter, the "Opening Brief"),[2] which Opening Brief advocates Infinity's proposed constructions for each of the patent claim terms in dispute.[3]

INTRODUCTION

The issue currently before the Court is the proper construction of nine (9) disputed claim terms. As a threshold matter, however, at this stage of the proceeding, Defendants' various attempts to vaguely argue invalidity and/or non-infringement – which arguments are numerous and replete in Defendants' Opposition Brief – are irrelevant and premature and should simply be ignored.

As for the parties' countervailing claim construction proposals themselves, the terms under dispute largely fall into one of two groups: terms which are expressly defined within the specification of the Patent-in-Suit and terms which are readily apparent from the specification for which general purpose dictionaries are helpful. With respect to the first category, where the specification of the Patent-in-Suit provides an express definition, that definition is dispositive. This is true for the disputed terms "blanket" and "fastener." As these terms are dispositively defined within the Patent-in-Suit itself, Defendants' various arguments in contravention of this legal maxim are unavailing.

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[1] *See* Docket Entry ("D.E.") No. 37 (Patent Case Scheduling Order) at ¶ 8(f) (setting the deadline for the party asserting infringement to serve and file a reply in further support of the opening claim construction brief).

[2] Infinity has prepared and hereby respectfully files this Reply subject to the objections and associated arguments set forth in Docket Entry Nos. 102 & 106, which are incorporated herein by this reference as if fully set forth herein. Specifically, Infinity objects to Defendants Jay Franco & Sons, Inc. and Jay at Play, Int'l HK's (collectively, "Jay Franco" or "Defendants") Responsive Claim Construction Brief [D.E. No. 99 (hereinafter the "Opposition Brief")] as grossly exceeding the page limitation imposed under the Court's Individual Practices. Infinity further objects to Defendants' Opposition Brief as improperly setting forth invalidity and non-infringement arguments inappropriate for claim construction. Finally, Infinity objects to Defendants' Opposition Brief as relying on the expert declaration of Dr. David Brookstein where Defendants failed to give Infinity advance notice of Dr. Brookstein's involvement as required under Local Patent Rule 2(ii) thus depriving Infinity of a meaningful opportunity to depose or otherwise cross examine Dr. Brookstein in connection with claim construction briefing. (*See* D.E. Nos. 102 & 106.)

[3] Unless otherwise explicitly specified herein, capitalized terms used throughout this Reply are to be given the same definitions as set forth in Infinity's Opening Brief. The same is equally true of pin citations to the Patent-in-Suit, which will subsequently be in the form '544:XX:YY – YY as explained in the Opening Brief.

As to the second category, i.e., terms which are readily apparent from the specification for which general purpose dictionaries are helpful, the parties largely appear to agree that the Court is permitted to look to the dictionary where no express definition is provided within the Patent-in-Suit itself. To this end, all of Infinity's proposed constructions for this second category of terms are derived from a reputable general purpose dictionary. As such, Infinity's proposals should be adopted, even adopted as largely unopposed. Defendants' proposals, on the other hand, should be ignored where Defendants routinely attempt to add additional limitations to otherwise straightforward dictionary definitions or Defendants rely on self-serving, conclusory expert testimony which is both unnecessary and unhelpful.

ARGUMENT

I. A CORRECT UNDERSTANDING OF THE LEGAL STANDARDS GOVERNING CLAIM CONSTRUCTION SUPPORTS INFINITY'S PROPOSALS

A. First, the Patentee's Lexicography Governs, Particularly in View of the Broadest Interpretation Rule Employed During Prosecution

The parties apparently agree on many of the legal standards governing claim construction;[4] nevertheless, some clarification is necessary on a few key issues. First, while it is true that "reasonable clarity, deliberateness, and precision" are necessary to put a PHOSITA on "notice" of the meaning of an expressly defined claim term (*see In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994)), there can be no dispute that where the patent specification "reveal[s] a special definition given to a claim term by the patentee that differs from the meaning it would

[4] (*See, e.g.*, D.E. No. 99 (Defendants' Opposition Brief) at 14 – 15, 19 & 21 (recognizing that claims should be interpreted to cover what the inventors "actually invented and intended to envelop with the claim," that dictionary definitions "should be used ***only*** so long as they do not contradict definitions found in or ascertained by a reading of the patent documents," and that the otherwise plain and ordinary meaning of a claim term can be overcome "when the patentee acts as his own lexicographer."))

otherwise possess…, the inventor's lexicography governs." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (*en banc*). Under such circumstances, "the inventor has dictated the correct claim scope, and *the inventor's intention, as expressed in the specification, is regarded as dispositive*." *Id.* (focus is on what the inventors "intended to envelop with the claim" (internal quotation marks omitted; emphasis added)). In short, a claim term expressly defined within the specification becomes a "term of art" unto itself, with the express definition applying uniformly throughout the patent. *See id.* at 1316-17; *see also Netword, LLC v. Centraal Corp.*, 242 F.3d 1347, 1352 (Fed. Cir. 2001) ("The claims are directed to the invention that is described in the specification; they do not have meaning removed from the context from which they arose.").[5] To this end, all a patentee need do to be his own lexicographer is "clearly express that intent in the written description" so as "to put one reasonably skilled in the art on notice that the inventor intended to redefine the claim term." *See Merck & Co., Inc. v. Teva Pharm. USA, Inc.*, 395 F.3d 1364, 1370 (Fed. Cir. 2005).

The foregoing truism is underscored by the patent prosecution process: "The Patent and Trademark Office ('PTO') determines the scope of claims in patent applications not solely on the basis of the claim language, but upon giving claims their broadest reasonable construction in light of the specification…." *Phillips*, 415 F.3d at 1316 (internal quotation marks omitted; all emphases added). The PTO's "broadest reasonable interpretation" rule seeks to ensure that, once issued, claims will not be interpreted more broadly than is justified. *See In re Yamamoto*, 740 F.2d 1569, 1571 (Fed. Cir. 1984). To this end, during prosecution, the PTO "tak[es] into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant's specification." *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997). Simply put, "[d]uring patent examination the pending claims must be interpreted as broadly as their terms reasonably allow" and "[w]hen the applicant states the

[5] *See also Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 389 (1996) ("[A claim] term can be defined only in a way that comports with the instrument as a whole."); *Merck & Co. v. Teva Pharms. USA, Inc.*, 347 F.3d 1367, 1371 (Fed. Cir. 2003) ("terms in a patent document are construed with the meaning with which they are presented in the patent"; "claims must be construed so as to be consistent with the specification").

meaning that the claim terms are intended to have, *the claims are examined with that meaning*, in order to achieve a complete exploration of the applicant's invention and its relation to the prior art." *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989) (emphasis added).[6] For this reason, it is it is "entirely appropriate for a court, when conducting claim construction, to rely heavily on the written description for guidance as to the meaning of the claims" as claim language must find "antecedent basis in the description" such that "the meaning of the terms may be ascertainable by reference [thereto]." *Phillips*, 415 F.3d at 1316-17.[7]

B. Second, the Patent-in-Suit is Presumptively Valid; the PTO Examined and Issued the Patent-in-Suit According to Accepted Law

Second, it is important to note that issued patents – including the Patent-in-Suit – are presumptively valid. Specifically, in pertinent part, Section 282 of Title 35 of the United States Code statutorily mandates that "[e]ach claim of a patent … shall be presumed valid" and "[t]he burden of establishing invalidity of a patent … shall rest on the party asserting such invalidity." 35 U.S.C. § 282; *see also, e.g., Aero Prods. Int'l., Inc. v. Intex Recreation Corp.*, 466 F.3d 1000, 1015 (Fed. Cir. 2006) ("Clear and convincing evidence is required to invalidate a patent."). In view of Section 282, it follows that the PTO presumptively did its job in examining and issuing the Patent-in-Suit, including ensuring that the underlying specification "conclude[s] with one or more claims particularly pointing out and distinctly claiming the subject matter which the inventor … regards as the invention." *See id.*; 35 U.S.C. § 112(b). In short, by virtue of issuance,

[6] *See also* MPEP § 2111.01 ("Under a broadest reasonable interpretation, words of the claim must be given their plain meaning, unless such meaning is inconsistent with the specification. …. [T]he best source for determining the meaning of a claim term is the specification – the greatest clarity is obtained when the specification serves as a glossary for the claim terms. The presumption that a term is given its ordinary and customary meaning may be rebutted by the applicant by clearly setting forth a different definition of the term in the specification. When the specification sets a clear path to the claim language, the scope of the claims is more easily determined and the public notice function of the claim is best served." (internal citations omitted)).

[7] *See also, e.g., Bates v. Coe*, 98 U.S. 31, 38 (1878) ("in case of doubt or ambiguity it is proper in all cases to refer back to the descriptive portions of the specification to aid in solving the doubt or in ascertaining the true intent and meaning of the language employed in the claims"); *White v. Dunbar*, 119 U.S. 47, 51 (1886) (specification is appropriately resorted to "for the purpose of better understanding the meaning of the claim"); *United States v. Adams*, 383 U.S. 39, 49 (1966) ("[I]t is fundamental that claims are to be construed in the light of the specification and both are to be read with a view to ascertaining the invention.").

it is presumed that the scope of the Patent-in-Suit is clear so as to inform the public of the boundaries of what constitutes infringement. *See* 35 U.S.C. §§ 282 & 112(b); *see also* MPEP § 2173. Moreover, to meet this requirement, the Patent-in-Suit need only "inform, with reasonable certainty, those skilled in the art about the scope of the invention." *See Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S.Ct. 2120, 2124 (2014).

C. Third, Absent Ambiguity, Extrinsic Evidence, Such as Expert Testimony, Should be Given Little or No Weight

Third, it is axiomatic that, absent some pervasive ambiguity, the "intrinsic record," "consisting principally of a specification that concludes with the claims," constitutes both the starting point and the ending point for constructing the claims. *Phillips*, 415 F.3d at 1313, 1315-17; *see also Bates*, 98 U.S. at 38 ("in case of doubt or ambiguity it is proper in all cases to refer back to the descriptive portions of the specification to aid in solving the doubt or in ascertaining the true intent and meaning of the language employed in the claims"); *White*, 119 U.S. at 51 (specification is appropriately resorted to "for the purpose of better understanding the meaning of the claim"); *Adams*, 383 U.S. at 49 ("[I]t is fundamental that claims are to be construed in the light of the specification and both are to be read with a view to ascertaining the invention."); *Netword, LLC*, 242 F.3d at 1352 ("The claims are directed to the invention that is described in the specification; they do not have meaning removed from the context from which they arose."). Simply put, it has been repeatedly held that the specification is "[u]sually … dispositive; it is the single best guide to the meaning of the disputed term[s]." *Phillips*, 415 F.3d at 1315. This is particularly true where "the ordinary meaning of claim language as understood by a [PHOSITA] may be readily apparent even to lay judges," for which "general purpose dictionaries may be helpful" for applying "widely accepted meaning" to "commonly understood words." *Id.* at 1314.

"Extrinsic evidence," on the other hand, is generally viewed as "less reliable"; more specifically, extrinsic evidence "is less significant than the intrinsic record in determining the legally operative meaning of claim language." *See Phillips*, 415 F.3d at 1317 & 1318 (internal quotation marks omitted). This is due to various limitations inherent to extrinsic evidence. *Id.* at

1318. For example, "extrinsic evidence by definition is not part of the patent and does not have the specification's virtue of being created at the time of patent prosecution for the purpose of explaining the patent's scope and meaning." *Id.* Likewise, "undue reliance on extrinsic evidence poses the risk that it will be used to change the meaning of claims in derogation of the indisputable public records consisting of the claims, the specification and the prosecution history, thereby undermining the public notice function of patents." *Id.* at 1319 (internal quotation marks omitted). In addition, given the "virtually unbounded universe of potential extrinsic evidence of some marginal relevance," reliance on such evidence will leave "the court with the considerable task of filtering the useful extrinsic evidence from the fluff." *Id.* at 1318; *see also Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.").

As one specific example of the foregoing limitations, "expert reports" and associated testimony "generated at the time of and for the purpose of litigation … can suffer from bias that is not present in intrinsic evidence." *Phillips*, 415 F.3d at 1318. "The effect of that bias can be exacerbated if the … expert's opinion is offered in a form that is not subject to cross-examination." *See id.; see also Senmed, Inc. v. Richard–Allan Med. Indus., Inc.*, 888 F.2d 815, 819 n. 8 (Fed. Cir. 1989) (rejecting an expert's "*post-hoc* opinion testimony on the legal question of whether [a claim term] should have a different meaning" than the meaning clearly used in the specification"). Moreover, the Federal Circuit has aptly observed that "conclusory, unsupported assertions by experts as to the definition of a claim term are not useful to a court" and, critically, "court[s] should discount any expert testimony that is clearly at odds with the claim construction mandated by the claims themselves, the written description, and the prosecution history, in other words, with the written record of the patent." *Phillips*, 415 F.3d at 1318.

At bottom, while extrinsic evidence may be useful for various limited purposes, such as providing background on the technology at issue or explaining how an invention works (*see id.*), extrinsic evidence "is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence." *See id.* at 1319. And where the intrinsic evidence unambiguously delineates the proper claim scope, extrinsic evidence contrary thereto must be given no weight whatsoever. *See id.* at 1318. In view of the foregoing, Defendants' reliance on the declaration of Dr. Brookstein, particularly in an effort to undercut definitions expressly set forth within the specification of the Patent-in-Suit, must be ignored. Moreover, Dr. Brookstein's declaration itself is infused with methodological flaws rendering the declaration unreliable. The methodological flaws in Dr. Brookstein's declaration will be fully addressed in a subsequent motion to strike or exclude portions of Dr. Brookstein's apparent testimony.

Finally, it is notable that Defendants' Opposition Brief repeatedly articulates many of the foregoing legal standards. (*See, e.g.*, D.E. No. 99.) For example, Defendants expressly recognize that claims should be interpreted to cover what the inventors "actually invented and intended to envelop with the claim." (*See id.* at 14 citing *Phillips*, 415 F.3d at 1318 (internal quotation marks and Defendants' emphases omitted).) Likewise, Defendants acknowledge that dictionary definitions "should be used ***only*** so long as they do not contradict definitions found in or ascertained by a reading of the patent documents." (*See id.* at 15 n.9 citing *Phillips*, 415 F.3d at 1318 (emphases in Defendants' original).) Defendants also recognize that the otherwise plain and ordinary meaning of a claim term can be overcome "when the patentee acts as his own lexicographer." (*See id.* at 19 – 22 (Defendants' emphases omitted).) Nevertheless, as discussed in more detail contextually, *infra*, no sooner does Defendants' Opposition Brief articulate the foregoing standards than it abandons their application whole cloth. Defendants' approach should not be countenanced; the correct application of the indisputable legal standards mandates the adoption of Infinity's claim construction proposals.

II. INFINITY'S CLAIM CONSTRUCTION PROPOSALS ARE SUPPORTED IN THE INTRINSIC RECORD OR ARE OTHERWISE READILY APPARENT AND SHOULD BE ADOPTED

A. The Specification of the Patent-in-Suit Reveals a Special Definition for the Terms "Blanket" and "Fastener"; Infinity's Proposals Should be Adopted as the Patentee's Lexicography Governs

INFINITY'S PROPOSED CONSTRUCTIONS	FRANCO'S PROPOSED CONSTRUCTIONS
Blanket	
A blanket, a comforter, a sheet, a jacket, a windbreaker, a parka, a poncho, a towel, a beach towel, a bath towel, a coat, a wrap, a scarf, a shawl, a cloak, a shirt, a sweatshirt, a hooded shirt, a hooded sweatshirt, or similar piece of clothing	Plain and ordinary meaning, *i.e.*, a flat geometric shaped piece of fabric having edges with corners wherein the edges extend along the perimeter to define the area.
Fastener	
A button and loop closure, a button and buttonhole closure, a hook and loop closure, a strap closure, a tie closure, a zipper closure, a snap closure, combinations of the foregoing closures, or any means whereby to retain an item	Plain and ordinary meaning, *i.e.*, a device for connecting or joining the ends of two members together.

There is not, nor can there be, any dispute that the specification of the Patent-in-Suit defines the terms "blanket" and "fastener," respectively, as follows:

> As used herein, the term "**blanket**" may include a blanket, a comforter, a sheet, a jacket, a windbreaker, a parka, a poncho, a towel, a beach towel, a bath towel, a coat, a wrap, a scarf, a shawl, a cloak, a shirt, a sweatshirt, a hooded shirt and/or a hooded sweatshirt. In general, one having skill in the art will appreciate that the teachings of the present invention may be applied to any piece of clothing or other material compatible with the underlying methodologies and principles disclosed herein.
>
> ****
>
> [I]n some embodiments **fastener** 50 is [*sic*] comprises at least one of a button and loop closure, a button and buttonhole closure, a hook and loop closure, a strap closure, a tie closure, a zipper closure, a snap closure, and combinations thereof. … Referring now to Fig. 6, fastener 50 may include any means whereby to retain blanket 12 within internal volume 46.

('544:2:62 – 3:3 (emphasis added); '544:4:62 – 66 (emphasis added); '544:4:60 – 62; *see also id.* at '544:3:5 – 30; '544:4:60 – 67.)

While it is possible that the special definitions provided for the terms "blanket" and "fastener" in the specification of the Patent-in-Suit may "differ from the meaning [these terms] would otherwise possess" (*Phillips*, 415 F.3d at 1316), the foregoing definitions are clear, deliberate and precise. *See In re Paulsen*, 30 F.3d at 1480. Put otherwise, the foregoing definitions "clearly express" the inventors' intent to be their own lexicographer sufficient "to put one reasonably skilled in the art on notice that the inventor[s] intended to redefine the claim term[s "blanket" and "fastener"]. *See Merck & Co.*, 395 F.3d at 1370. Nothing more is required. *See id.* Simply stated, "the inventor[s] ha[ve] dictated the correct claim scope," and their "intention, as expressed in the specification, is regarded as dispositive." *Phillips*, 415 F.3d at 1316. Moreover, as the inventors of the Patent-in-Suit are themselves PHOSITAs (*e.g. id.* at 1313; *Standard Oil Co. v. Am. Cyanamid Co.*, 774 F.2d 448, 454 (Fed. Cir. 1985)), the foregoing special definitions are the definitions a PHOSITA would give to the terms "blanket" and "fastener" in view of the specification of the Patent-in-Suit. Thus, the terms "blanket" and "fastener," respectively, for all purposes germane to the former prosecution and current enforcement of the Patent-in-Suit, have become defined terms of art unto themselves. *See id.* at 1316-17; *see also Netword*, 242 F.3d at 1352; n.5, *supra*. For these reasons, Infinity's claim construction proposals for "blanket" and "faster" should both be adopted.

1. Defendants' Countervailing Arguments Regarding "Blanket" and "Fastener" are Either at Odds with the Law or Simply Unavailing

Notwithstanding Defendants' express acknowledgement that a patentee can be his or her own lexicographer and that the patentee's intentions, as expressed in the specification, are dispositive (*see, e.g.*, D.E. No. 99 at 14 & 19 – 22), Defendants' challenge the clarity of the special definitions set forth in the Patent-in-Suit. (*See id.* at 5 – 24 & 28 – 31.) However, Defendants' arguments are either at odds with the correct legal standards or are otherwise unavailing.

Taking each argument in turn, Defendants first suggest that the patentees somehow inherently limited the meaning of the words "blanket" and "fastener" by use of those single, unadorned words at various places in the specification of the Patent-in-Suit. (*See id.* at 6 – 24 & 28 – 31.) More specifically, for example, Defendants assert that the patentees' use of the word "blanket," sometimes used on its own in the specification, somehow limits the public notice function of the Patent-in-Suit such that the public and the PTO have been misled. (*See id.* at 6 – 24.) Indeed, Defendants even conjecture that the PTO was somehow duped into examining the Patent-in-Suit only in relation to the lone word "blanket," entirely on its own, or otherwise deprived of the opportunity to fully and properly examine the Patent-in-Suit. (*See id.* at 12 – 15 & 18.) Relatedly, Defendants contend that any other "articles of clothing" were never claimed, and have thus been dedicated to the public. (*See id.* at 16 – 18.)

These arguments, however, are legally without merit. To begin with, Defendants' position ignores the patent prosecution process. Specifically, Defendants' argument entirely disregards the PTO's "broadest reasonable construction" rule. *See Phillips*, 415 F.3d at 1316. Contrary to Defendants' position, the "broadest reasonable construction" rule requires the PTO to "tak[e] into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the applicant's specification." *See In re Morris*, 127 F.3d at 1054. Indeed, "[w]hen the applicant states the meaning that the claim terms are intended to have, *the claims are examined with that meaning*, in order to achieve a complete exploration of the applicant's invention and its relation to the prior art." *In re Zletz*, 893 F.2d at 321 (emphasis added). Relatedly, Defendants' argument entirely ignores the associated presumption of patent validity, and the corollary that the PTO properly did its job during examination. 35 U.S.C. §§ 282, 112(b); *Aero Prods.*, 466 F.3d at 1015. Finally, Defendants' argument ignores the clear intrinsic record, which reflects that patentees' intent to be their own lexicographer sufficient to put a PHOSITA on notice. *See Merck & Co.*, 395 F.3d at 1370.

Simply put, as discussed above, the terms "blanket" and "fastener," as expressly defined within the specification of the Patent-in-Suit, have become terms of art unto themselves. *See*

Phillips, 415 F.3d at 1316-17. Put otherwise, the words "blanket" and "fastener," as used respectively throughout the Patent-in-Suit, are not merely used in the abstract—they comprise a short-hand for expressing the entirety of the explicitly definitions set forth in the specification each and every time such terms are used throughout the Patent-in-Suit. As such, the full breadth and scope of the patentees' definitions were presumptively examined by the PTO and the resulting claim language, far from dedicating some scope to the public, is infused with equal scope. *In re Zletz*, 893 F.2d at 321. Nevertheless, Defendants would have this Court second guess the expertise of the PTO and believe that the PTO failed in its statutory obligations at the most fundamental level—to ensure that an inventor particularly points out and distinctly claims the subject matter which he regards as his invention. However, Defendants offer no evidence, let alone clear and convincing evidence, necessary to prove that the PTO failed in its statutory charge. *See Aero Prods.*, 466 F.3d at 1015. The Patent-in-Suit is presumptively valid, the PTO did its job, and Infinity is entitled to the definitions of "blanket" and "fastener" set forth and examined in the specification.

Second, Defendants contend that various "structural elements" (i.e., a perimeter, an area, a perimeter edge, etc.) discussed during prosecution of the Patent-in-Suit somehow limit the scope of the term "blanket." (*See* D.E. No. 99 at 6 – 15.) At the outset, it is notable that, "because the prosecution history represents an ongoing negotiation between the PTO and the applicant, rather than the final product of that negotiation, it often lacks the clarity of the specification and thus is less useful for claim construction purposes." *Phillips*, 415 F.3d at 1317. Regardless, however, Defendants' argument is without merit. Specifically, each of the so-called "structural elements" Defendants take issue with are themselves claim limitations. (*See, e.g.*, '544:5:22 – 6:63.) For example, in addition to requiring a blanket, independent claim 1 recites "a perimeter defining an area," etc. (*See id.*) In short, the prosecution process referenced by Defendants resulted in additional claim limitations, each of which must be shown in the accused product to prove infringement. The presence of such additional limitations within the claims themselves, however, has no impact on the scope of the claim term "blanket." Indeed, to hold otherwise would render the additional limitations recited in the claims superfluous as Defendants apparently believe all such limitations are already present in the term "blanket" itself. *See, e.g., Phillips*, 415 F.3d at 1314-15 (the addition of a limitation gives rise to the presumption that the limitation is not already present). This is not correct. *See id.* Indeed, the presence of such additional limitations inherently means such limitations are not already present in the form of another claim term. *See id.*

Third, Defendants rely on various dictionary definitions for the terms "blanket" and "fastener," respectively, as well as expert testimony. (*See* D.E. No. 99 at 15 & 29.) However, Defendants expressly acknowledge that dictionary definitions "should be used ***only*** so long as they do not contradict definitions found in or ascertained by a reading of the patent documents." (*See id.* at 15 n.9 citing *Phillips*, 415 F.3d at 1318 (emphases in Defendants' original).) Defendants further acknowledge that, "[i]n reviewing the intrinsic record to construe the claims, [courts] strive to capture the scope of the actual invention, rather than … allow the claim language to become divorced from what the specification conveys is the invention." (*See id.* at 2 n.2 quoting *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296, 1305 (Fed. Cir. 2011) (internal quotation marks omitted)). Beyond these telling acknowledgements, however, Defendants simply ignore the law's preference for the intrinsic record. (*See* Section I(C), *supra*.) In particular, Defendants seek to elevate self-serving, conclusory expert testimony and dictionary definitions over the clear intent of the intrinsic record. (*See id.*) This the law forbids. (*See id.*) This is particularly egregious as, to date, Defendants have deprived Infinity from cross examining Defendants' heretofore undisclosed expert. *See, e.g., Phillips*, 415 F.3d at 1318. (*See also* n.2, *supra*.) At bottom, where the specification provides an unambiguous definition for the terms "blanket" and "fastener," extrinsic evidence must be ignored. *See, e.g., Phillips*, 415 F.3d at 1318.

Fourth, Defendants contend that "blanket" cannot be defined to include the generic word blanket or to include hooded garments where a "hood" is also a claim limitation. (*See* D.E. No. 99 at 20 & 22 – 23.) These arguments are equally without merit. First, as Defendants clearly point out, the specification of the Patent-in-Suit provides a definition for "blanket" that differs from the meaning blanket would otherwise possess. More particularly, the specification specially defines the term "blanket" to include a traditional blanket *as well as* other articles of clothing and pieces of material. ('544:2:62 – 3:3; *see also id.* at '544:3:5 – 30.) To this end, the definition provided for "blanket" is not circular; instead, it provides clear notice to the public that "blanket" includes a traditional blanket as well as other articles of clothing and pieces of material not traditionally considered blankets. This is equally true for hooded garments. More specifically, by defining "blanket" to include hooded garments, the specification provides clear notice to the public that the hooded garment itself can have an additional hood attached thereto for purposes of applying an ornamental surface thereon, i.e., a two-hooded garment. This is no way prevents "blanket" from being defined to include hooded garments.

Finally, with respect to the term "fastener," Defendants contend that the limitations imposed in dependent claim 19 somehow limit the broad term "fastener" as it appears in, *inter alia*, independent claim 18. (*See* D.E. No. 99 at 29 – 31.) This is incorrect. Specifically, as defined within the specification, the term "fastener" can cover a variety of closures or fasteners, or indeed "any means whereby to retain [an item]." ('544:4:60 – 67.) Dependent claim 19 further limits the universe of available fastening means to "one of a button and loop closure, a hook and loop closure, a strap closure, a tie closure, a zipper closure, and a snap closure." ('544:6:59 – 61.) This is no way limits the broad term "fastener" as it appears in, *inter alia*, independent claim 18. Indeed, to hold otherwise would violate the doctrine of claim differentiation. *See, e.g., Comark Comm., Inc. v. Harris Corp.*, 156 F.3d 1182, 1187 (Fed. Cir. 1998); *see also Phillips*, 415 F.3d at 1314 – 15; *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1249 (Fed. Cir. 1998).

In sum, Infinity's proposals for "blanket" and "fastener", drawn directly from the specification, should be adopted as such proposals constitute the special definitions set forth in the specification and examined during prosecution. Indeed, these special definitions are dispositive. *Phillips*, 415 F.3d at 1316. Moreover, Defendants' dual definition, i.e., "plain and ordinary meaning" along with a separate definition, is simply confusing and unhelpful and should be rejected. Likewise, Defendants' proposal must be rejected where it would improperly limit construction of the terms "blanket" and/or "fastener" to a single embodiment disclosure in the specification, which is forbidden. *Phillips*, 415 F.3d at 1323.

B. The Terms "Perimeter" and "Perimeter Edge" Should be Construed Consistently Accordingly to the Plain Meaning Readily Apparent in the Specification

INFINITY'S PROPOSED CONSTRUCTION	FRANCO'S PROPOSED CONSTRUCTION
The outer limits of an area	Plain and ordinary meaning, *i.e.*, the outside edge of the area of the flat surface of the blanket.

Despite originally contending that "perimeter" and "perimeter edge" should be construed separately, Defendants now apparently agree that a uniform construction is proper. (*See* D.E. No. 99 at 24 – 26.) Regardless, the parties agree that "perimeter" is not specially defined within the specification. (*See id.*) Nevertheless, "the ordinary meaning of [perimeter] as understood by a [PHOSITA is] readily apparent" as that term is used within the specification of the Patent-in-Suit and "general purpose dictionaries may be helpful" for applying "widely accepted meaning" to this "commonly understood word[]."*See Phillips*, 415 F.3d at 1316. Indeed, Defendants themselves rely on a dictionary definition consistent with Infinity's proposal, i.e. "the outside edge of an area or surface." (*See* D.E. No. 99 at 25 quoting Meriam-Webster online (internal quotation marks omitted).) To this end, the parties ostensibly agree that a general purpose dictionary is suitable for providing the plain and ordinary meaning of the term "perimeter." Infinity's proposal is precisely this—a general purpose dictionary definition which is consistent with the entire specification. (*See* D.E. No. 96-4.) Accordingly, Infinity's proposal should be adopted as effectively unopposed.

Nevertheless, Defendants continue to advocate a confusing dual definition which exceeds the bounds of *any* definition found within a general purpose dictionary. In doing so, Defendants rely on a variant of their "structural elements" and prosecution history argument discussed above. (*See* D.E. No. 99 at 25.) As discussed above, however, this argument is unavailing. Beyond the inherent limited usefulness of the prosecution history (*Phillips*, 415 F.3d at 1317), each of the so-called "structural elements" discussed in Defendants argument, as well as the relationship of the "structural elements" to each other and/or other claim limitations, are themselves set forth in the asserted claims. (*See, e.g.*, '544:5:22 – 6:63.) As such, not only did Infinity not disclaim any claim scope for the term "perimeter" during prosecution, Infinity will necessarily need to show that each of the so-called "structural elements" are present in Defendants' accused products in order to prove infringement. To this end, the independent structural elements necessary for infringement are already expressly required by the asserted claims and need not somehow be "built into" the term "perimeter." Indeed, to do so is legal error. *See, e.g.*, *Phillips*, 415 F.3d at 1314-15 (the addition of a limitation gives rise to the presumption that the limitation is not already present). Accordingly, Defendant's proposal must be rejected as exceeding the bounds of a suitable and readily apparent definition. Moreover, as the correct construction is readily apparent from the intrinsic record, Defendants' reliance on self-serving, conclusory expert testimony is totally unnecessary and unhelpful. (*See* Section I(C), *supra*.)

C. The Plain Meaning of the Terms "Positioned Externally," "Continuous Edge Surface," and "Body" are Also Readily Apparent in the Patent-in-Suit

INFINITY'S PROPOSED CONSTRUCTION	FRANCO'S PROPOSED CONSTRUCTION
Positioned Externally	
Relating to, existing on, or connected with the outside or an outer part	Positioned outside or beyond an area defined by the perimeter of the blanket.
Continuous Edge Surface	
An uninterrupted boarder	The entire edge of the hood, including a detached edge that defines the opening of the hood and an attached edge coupled to the perimeter of the blanket.
Body	

The main, principal, or central part	Plain and ordinary meaning, *i.e.*, the flat surface of the blanket defined by the perimeter of the blanket that forms a geometric shape.

The arguments set forth above (*see* Section II(B), *supra*) are equally applicable to the terms "positioned externally," "continuous edge surface," and "body." Specifically, the parties agree that these terms are not specially defined within the specification. (*See* D.E. No. 99 at 26 – 32.) Nevertheless, "the ordinary meaning of [all three terms] as understood by a [PHOSITA is] readily apparent" as the terms are used within the specification of the Patent-in-Suit and "general purpose dictionaries may be helpful" for applying "widely accepted meaning" to these "commonly understood words." *See Phillips*, 415 F.3d at 1316. Infinity's proposals, therefore, rely on definitions found within general purpose dictionaries in view of the entire specification. (*See* D.E. Nos. 96-5, 96-6, & 95-8.) Accordingly, Infinity's proposals should be adopted.

For its part, Defendants once again rely on insinuation stemming from the prosecution history of the Patent-in-Suit. (*See* D.E. No. 99 at 26 – 32.) Such insinuation, however, is utterly unavailing. There is nothing in the prosecution history of the Patent-in-Suit which demonstrates the disavowal of claim scope, let alone the necessity of adopting Defendants' claim construction proposals. Simply put, Defendants' repetitive "structural elements" and corresponding prosecution-history-based arguments are already accounted for in the comprehensive set of limitations set forth in the asserted claims in their entirety. The Court need not somehow augment claim language which already exists.

Moreover, as addressed in Infinity's Opening Brief and ignored in Defendants' Opposition Brief, Defendants' proposal for "positioned externally" must be rejected as it would either exclude all embodiments of the invention or otherwise render the invention inoperable. Specifically, Defendants' proposal includes the phrase "outside or beyond … the perimeter of the blanket." (*See* D.E. No. 99 at 26.) This would exclude preferred embodiments or render the asserted claims inoperable as the "hood" could not even be attached to the "blanket" if it was "outside *or beyond*" the perimeter of the blanket. This violates claim construction law. *E.g.*, *MBO Labs. Inc. v. Becton Dickinson & Co.*, 474 F.3d 1323, 1333 (Fed. Cir. 2007) ("A claim interpretation that excludes a preferred embodiment from the scope of the claim is rarely, if ever, correct." (internal quotation marks omitted)). Regardless, nothing in the intrinsic record mandates such a construction; to the contrary, the intrinsic record prohibits such a construction. (*See* '544:3:50 – 64; 4:39 – 69; 5:8 –11; 5:26 – 33; 6:6 – 13; 6:37 – 40; Figs. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.)

Similarly, like many of its other proposals, Defendants' proposal for "continuous edge surface" must be rejected where it confusingly duplicates other words which are already expressly included in the very claims being asserted. To this end, if Defendants' proposal is given to the jury in place of the phrase "continuous edge surface," the result with be a confusing repetition of various claim limitations.

Finally, Defendants' confusing dual proposal for "body" should be rejected as unhelpful, particularly where Defendants advocate the use of unnecessary technical jargon. Defendants' proposal for "body" also suffers from the infirmities of its proposal for "continuous edge surface," i.e., the circular use of words which are already themselves expressly included in the asserted claims.

Accordingly, Defendant's proposals must be rejected as exceeding the bounds of suitable and readily apparent definitions. Moreover, as the correct constructions are readily apparent from the intrinsic record, Defendants' reliance on self-serving, conclusory expert testimony is totally unnecessary and unhelpful. (*See* Section I(C), *supra*.)

D. The Term "Area" Requires No Construction; The Jury is Well Equipped to Understand this Everyday Term

INFINITY'S PROPOSED CONSTRUCTION	FRANCO'S PROPOSED CONSTRUCTION
No proposed construction; plain and ordinary meaning	Plain and ordinary meaning, *i.e.*, the flat surface of the blanket defined by the perimeter of the blanket

As discussed in Infinity's Opening Brief, and ignored in Defendants' Opposition Brief, the term "area" is well within the common vocabulary of lay members of the jury. Defendants offer no explanation for why this is not the case, or why it is somehow critical to construe "area." It is not. The Court need not construe every word of the asserted claims and, as with area, it would be more confusing to construe "area" than simply to provide it to the jury as-is. This is particularly true for Defendants' confusing dual construction which defines one term with other terms under construction. *See, e.g.*, Peter S. Menell et al., *Patent Claim Construction: A Modern Synthesis and Structured Framework*, 25 BERKELEY TECH. L.J. 711, 731-32 (2010) ("straightforward … language" can "stand as-is");[8] *see also Phillips*, 415 F.3d at 1313; *Apple Inc. v. Motorola, Inc.*, No. 1:11-cv-08540, 2012 WL 8123793, at *1 (N.D. Ill. March 12, 2012) (unpublished) (Cir. J. Richard A. Posner). Simply put, "area" should be given to the jury as-is. Defendants offer no reasoned analysis to the contrary, instead only offering a virtually irrelevant and unhelpful discussion of the prosecution history. (*See* D.E. No. 99 at 32 – 33.) Moreover, as "area" needs no construction, Defendants' reliance on self-serving, conclusory expert testimony is totally unnecessary and unhelpful. (*See* Section I(C), *supra*.)

E. The Plain Meaning of the Term "Corner," as Found in General Purpose Dictionaries, is Readily Apparent in the Patent-in-Suit

INFINITY'S PROPOSED CONSTRUCTION	FRANCO'S PROPOSED CONSTRUCTION
The position at which two lines, surfaces, or edges meet	Plain and ordinary meaning, *i.e.*, the part of the geometric shaped blanket where two edges meet.

Finally, as to the term "corner," the same arguments set forth above (*see* Sections II(B) & II(C), *supra*) are equally applicable. Specifically, the parties agree that "corner" is not specially defined within the specification. (*See* D.E. No. 99 at 33.) Nevertheless, "the ordinary meaning of [corner] as understood by a [PHOSITA is] readily apparent" as that term is used within the specification of the Patent-in-Suit and "general purpose dictionaries may be helpful" for applying

[8] Available at: http://scholarship.law.berkeley.edu/facpubs/564.

"widely accepted meaning" to this "commonly understood word[]." *See Phillips*, 415 F.3d at 1316. Indeed, Defendants' argument relies on a dictionary definition consistent with Infinity's proposal, i.e. "the part of something … where two edges meet." (*See* D.E. No. 99 at 25 quoting Macmillan Dictionary (internal quotation marks omitted).) To this end, the parties ostensibly agree that a general purpose dictionary is suitable for providing the plain and ordinary meaning of the term "corner." Infinity's proposal, therefore, relies on a definition found within general purpose dictionaries in view of the entire specification. (*See* D.E. No. 96-9.) Accordingly, Infinity's proposals should be adopted as effectively unopposed.

Notwithstanding the foregoing, Defendants continue to advocate a confusing dual definition which exceeds the bounds of *any* definition found within a general purpose dictionary. Specifically, Defendants continue to regurgitate their unavailing "structural elements" and prosecution history arguments which have been thoroughly debunked previously. (*See* D.E. No. 99 at 33 – 35.) At bottom, Defendant's proposal must be rejected as exceeding the bounds of a suitable and readily apparent definition. Moreover, as the correct construction is readily apparent from the intrinsic record, Defendants' reliance on self-serving, conclusory expert testimony is totally unnecessary and unhelpful. (*See* Section I(C), *supra*.)

III. DEFENDANTS' INVALIDITY AND NON-INFRINGEMENT ARGUMENTS ARE PREMATURE AND SHOULD BE IGNORED

While irrelevant for purposes of claim construction, it is worth noting that Defendants' Opposition Brief is replete with various arguments targeted at the alleged invalidity of the Patent-in-Suit and/or non-infringement of the asserted claims. (*See* D.E. No. 99 *passim*.) Such arguments are inappropriate and premature at the claim construction phase. In particular, such arguments are case dispositive in nature. It has been recognized, however, that claim construction should generally precede dispositive motions:

> Claim construction plays a central role in scheduling and managing summary judgment motions. …. Furthermore, most of the weighty issues in a patent case—the technical aspects of infringement, and most allegations of invalidity—depend in some way on claim construction. As a result, summary judgment on the main

> issues in a patent case (infringement and invalidity) generally cannot be resolved without construing at least some disputed claim terms.

E.g., Menell et al., *supra*, at 732. Indeed, it is axiomatic that patent infringement is a two-step analysis: ***first***, the court construes the claim language; and, ***second***, the trier of fact compares the properly construed claims to the accused device. *E.g., Playtex Prods., Inc. v. Procter & Gamble Co.*, 400 F.3d 901, 905-906 (Fed. Cir. 2005). Moreover, Defendants' have already attempted to short circuit the orderly progression of this case by seeking "the Court's permission to file a[n early] Motion for Summary Judgment." (*See* D.E. No. 74.) Consistent with the foregoing legal authority, however, Defendants' request was rejected. (D.E. No. 81.) Instead, Defendants were "directed to follow the Local Patent Rules and the Scheduling Order." (*Id.*) In view of both this Court's prior order and legal authority consistent therewith, all of Defendants' various invalidity/non-infringement arguments set forth in the claim construction briefing should simply be ignored as premature.

The foregoing is equally true for Defendants' repeated argument that its accused products include "two arms and two legs" (*e.g.* D.E. No. 99 at 2) in addition to all of the elements necessary to infringe the asserted claims. Specifically, all of the asserted claims include the transitional phrase "comprising." (*See*, '544:5:22 – 6:63.) "Comprising" is inclusive or open-ended such that it does not exclude additional, unrecited elements. *See, e.g., Mars Inc. v. H.J. Heinz Co.*, 377 F.3d 1369, 1376 (Fed. Cir. 2004); *Invitrogen Corp. v. Biocrest Mfg., L.P.*, 327 F.3d 1364, 1368 (Fed. Cir. 2003). As such, it is meaningless, both now and at the dispositive motion phase, that Defendants' infringing products include additional, unrecited elements.

CONCLUSION

For all of the foregoing reasons, Infinity respectfully urges the Court to adopt Infinity's constructions provided herein for the nine (9) terms at issue, as summarized in Exhibit B to Infinity's Opening Brief [D.E. No. 96-2].

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 21st day of October, 2015, a copy of the foregoing was filed with the Court's CM/ECF system, which provides service to all counsel of record.

/s/James T. Burton